

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1190

To be argued by
V. THOMAS FRYMAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1190

UNITED STATES OF AMERICA,

Appellee,

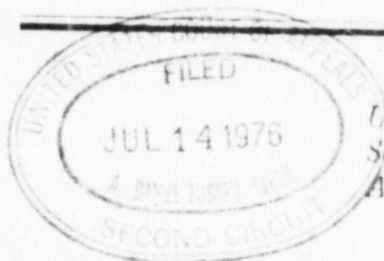
—v.—

DAVID HAIRSTON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's Case	2
1. The May 23, 1975, Sale	2
2. The May 30, 1975, Sale	7
3. Subsequent Events	11
B. The Defense Case	13
Argument	16
Hairston Was Not Entrapped As A Matter Of Law	16
A. The Proof at Trial Fully Supported the Jury's Conclusion that Hairston Was Pre- disposed to Sell the Heroin	18
B. The Government Did Not Engage in Conduct Which Required a Finding of Entrapment As A Matter of Law	21
CONCLUSION	25

TABLE OF AUTHORITIES

Cases:

<i>Dyer v. MacDougall</i> , 201 F.2d 265 (2d Cir. 1952) ..	21
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	20
<i>Hampton v. United States</i> , 96 S. Ct. 1646 (1976)	
16, 17, 21, 22, 23, 24, 25	

	PAGE
<i>Lutwak v. United States</i> , 344 U.S. 604 (1963)	20
<i>Sherman v. United States</i> , 356 U.S. 369 (1958)	16, 17
<i>Sorrells v. United States</i> , 287 U.S. 435 (1932)	16, 17
<i>United States v. Arcuri</i> , 405 F.2d 691 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969)	21
<i>United States v. Bueno</i> , 447 F.2d 903 (5th Cir. 1971)	23
<i>United States v. Chisum</i> , 312 F. Supp. 1307 (C.D. Cal. 1970)	23
<i>United States v. Edmonds</i> , Dkt. No. 75-1323, slip op. 562 (2d Cir. May 7, 1976)	22
<i>United States v. Hampton</i> , 507 F.2d 832 (8th Cir. 1974), <i>aff'd</i> , 96 S. Ct. 1646 (1976)	23
<i>United States v. Ingenito</i> , 531 F.2d 1174 (2d Cir. 1976)	23
<i>United States v. Jett</i> , 491 F.2d 1078 (1st Cir. 1974)	23
<i>United States v. Mascia</i> , 447 F.2d 1111 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972)	20
<i>United States v. McCarthy</i> , 473 F.2d 300 (2d Cir. 1972)	20
<i>United States v. McGrath</i> , 412 U.S. 936 (1973)	23
<i>United States v. McGrath</i> , 494 F.2d 562 (7th Cir. 1974)	23
<i>United States v. McGrath</i> , 468 F.2d 1027 (7th Cir. 1972), <i>vacated</i> , 412 U.S. 936 (1973), <i>modified</i> , 494 F.2d 562 (7th Cir. 1974)	23
<i>United States v. Miranda</i> , 526 F.2d 1319 (2d Cir. 1975)	20
<i>United States v. Neal</i> , Dkt. No. 75-1413, slip op. 815 (2d Cir. June 3, 1976)	22

<i>United States v. Oquendo</i> , 490 F.2d 161 (5th Cir. 1974)	23, 24
<i>United States v. Pui Kan Lam</i> , 483 F.2d 1202 (2d Cir. 1973), <i>cert. denied</i> , 415 U.S. 984 (1974) ..	21
<i>United States v. Russell</i> , 411 U.S. 423 (1973) ...	16, 17, 22, 23, 24
<i>United States v. Super</i> , 492 F.2d 319 (2d Cir.), <i>cert. denied</i> , 419 U.S. 876 (1974)	20
<i>Statutes:</i>	
21 U.S.C. § 812	1
21 U.S.C. § 841(a)(1)	1
21 U.S.C. § 841(b)(1)(A)	1

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FOR THE SECOND CIRCUIT

Docket No. 76-1190

UNITED STATES OF AMERICA,

Appell. e.

—v.—

DAVID HAIRSTON,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

David Hairston appeals from a judgment of conviction entered on April 6, 1976, in the United States District Court for the Southern District of New York following a four day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 75 Cr. 1119, filed on November 18, 1975 (App. A-3, A-4),* charged appellant David Hairston and his brother, Harry Hairston, with having possessed with intent to distribute 80.5 grams of heroin on May 23, 1975 (Count One) and 213.9 grams of heroin on May 30, 1975 (Count Two) in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

* "App." refers to pages of Appellant's Appendix; "Br." refers to pages of Appellant's Brief; "Tr." refers to pages of the trial transcript; and "GX" refers to Government Exhibits received in evidence.

Trial commenced on February 17, 1976, and at the close of all the evidence the District Court denied a motion by David Hairston for a directed verdict of acquittal on the ground that entrapment had been established "as a matter of law". (Tr. 351-52). On February 20, 1976, the jury returned a verdict against David Hairston of guilty on both counts of the indictment and a verdict against Harry Hairston of not guilty on Count One and guilty on Count Two. The District Court again denied a motion by David Hairston for a directed verdict of acquittal based on entrapment "as a matter of law" after the jury's verdict as to him. (Tr. 479-80).

On April 6, 1976, Judge Frankel sentenced David Hairston to imprisonment for 30 months on each count, the sentences to run concurrently, and to special parole terms of three years on each count, to run concurrently and to commence upon expiration of confinement. He sentenced Harry Hairston to imprisonment for six months, probation for three years, and a special parole term for three years to run concurrently with the period of probation.

Appellant, David Hairston, filed a notice of appeal on April 9, 1976. Harry Hairston did not appeal.

Statement of Facts

A. The Government's Case.

1. The May 23, 1975, Sale.

On May 23, 1975, around 3:30 p.m., Special Agent Garfield Hammonds, Jr., of the Drug Enforcement Administration (DEA) received a telephone call on an "undercover" phone at DEA headquarters from appellant David Hairston and a DEA informant, Safwan Salam. Agent Hammonds recorded the conversation, and the tape and a transcript were admitted into evidence. (GX

3A, 3B.. Part of the conversation consisted of code words or street jargon which Hammonds explained in his testimony.

In that conversation Hammonds and Hairston first discussed the heroin Hairston wanted to sell, which they called "shirts" (Tr. 42), and its strength or the number of times it could be cut, which they called the number of "stripes" (Tr. 42-43):

"Garfield Hammonds, Jr.: Yeah, what you wanna do, man? Cat say you had some pretty nice things, you know.

David Hairston: Yeah.

Garfield Hammonds, Jr.: Hmm.

David Hairston: What you talkin' about?

Garfield Hammonds, Jr.: Oh, well, how are your shirts?

David Hairston: Yeah, uh, well, according on how many you want. I gotta, uh, uh, uh a few with, uh, you know, they got like, uh, ten stripes in 'em.

Garfield Hammonds, Jr.: Ten stripes?

David Hairston: Yeah, different colors.

Garfield Hammonds, Jr.: Yeah, well, that sound pretty good. That's, shit, that's what I been lookin' for, you know. If, if you're sure you got the right stripes on it, you know.

David Hairston: That's correct." (GX 3B, at 1-2).

They tentatively agreed that Hammonds would purchase five ounces, which they called five "z's" (Tr. 43):

David Hairston: But uh, only thing I want to know, what, uh, like uh, how many would you want?

Garfield Hammonds, Jr.: Uhh, well, you know, I would have to look at it, you know.

David Hairston: I know.

Garfield Hammonds, Jr.: I'd have to look at the merchandise, you know.

David Hairston: (Inaudible) you know. Just tell me, if it was all right, if you thought it, it was that way, how many would you want?

Garfield Hammonds, Jr.: Uh.

David Hairston: Don't bullshit. I mean, you know, I'm ready to, to talk.

Garfield Hammonds, Jr.: Uh, I would say umm, let me

David Hairston: Would it be like eight, or uh, just one?

Garfield Hammonds, Jr.: Um, five. How about that?

David Hairston: Five "Z's"?

Garfield Hammonds, Jr.: Yeah.

David Hairston: Yeah.

Garfield Hammonds, Jr.: You see? Yeah. If you say, you know, if

David Hairston: Yeah, I know. I understand what you're sayin'.

Garfield Hammonds, Jr.: Yeah, right.

David Hairston: If it checks out, it's, it's official.

Garfield Hammonds, Jr.: Right." (GX 3B, at 4-5).

Hairston was to bring three ounces to their initial meeting for Hammonds to check. (GX 3B, at 9). After some negotiation, a price of \$2,200 an ounce was agreed upon. (Tr. 43; GX 3B, at 7).

Early in the conversation Hairston inquired if Hammonds would be a consistent buyer and whether his "store" could handle it. (GX 3B, at 2). Hammonds replied that he had a "factory", not a "store":

"Garfield Hammonds, Jr.: Yeah, well, aha ha, I don't have no store, baby, I got a factory.

David Hairston: Ha, ha, ha, ha.

Garfield Hammonds, Jr.: See what I'm sayin'?

David Hairston: Okay.

Garfield Hammonds, Jr.: Uh, yeah, if I had a store, you know, shit, I'd be up on 116th Street or somewhere, you know.

David Hairston: Right.

Garfield Hammonds, Jr.: But I got a whole factory, you know, and I can move it. See what I'm sayin'?" (GX 3B, at 3).

At the end of the conversation they fixed 6:30 p.m. as the time for a meeting, but Hairston explained that he

might be late because of business with other "stores" and "factories":

"David Hairston: (Inaudible) Look, I tell you what, what you do. Uh, if I get jammed into a time thing, uh, because, like, I have, uh, you know, other, uh, you know, stores and, uh, I got a couple factories that's interested in doing some business

Garfield Hammonds, Jr.: Yeah, right.

David Hairston: So, uh, uh, if I'm a little late, you lay for me, I will definitely show." (GX 3B, at 17).

That evening Agent Hammonds went to the house where they had agreed to meet. When David Hairston arrived, the informant introduced Agent Hammonds to him, calling Hammonds "Tony". Hammonds testified that they sat down at the kitchen table, and Hairston told Hammonds that he wanted to see the money before they entered into any type of discussion. Hammonds produced a roll of money containing \$6,000. Hairston then stated that he was going outside and would return. (Tr. 44).

DEA Special Agent Michael Powers observed David Hairston leave the house, get into a green Dodge Colt, and drive a few blocks to where Harry Hairston sat parked in a silver Mercury Cougar. David Hairston stopped his car, walked over to the Cougar and spoke to his brother. He put his arm inside the Cougar and then returned to his car, which he drove back to the house where Hammonds was awaiting his return. (Tr. 150-54).

When David Hairston returned, he handed Hammonds an aluminum foil package containing three individually wrapped plastic bags of heroin which he guaranteed was "with ten stripes". (Tr. 46). Hammonds tested the powder and questioned its quality but said it did not make any difference because he would bring the heroin back if he did not like it. (Tr. 46-48). Hairston then replied:

"Wait a minute, I do not take any of my product back. If anything go wrong with it, we can talk about it and I will make it up but I will tell you right now I don't take any powder back, any of my product back." (Tr. 48).

Hairston told Agent Hammonds that he was basically a wholesaler of narcotics with several overseas connections and that he was looking for large scale buyers of his product. In addition to heroin, he said he could supply hashish and cocaine. (Tr. 48-49). He asked Hammonds about the best cocaine he had ever bought. Hammonds replied that he thought a "4 cut" was the best anyone could purchase. (Tr. 49). Hairston said no, he had some cocaine that could be cut seven times—"Try it, you'll like it," he continued. (Tr. 49).

The price for the heroin delivered by Hairston was \$6,600. Hammonds gave Hairston \$6,000, and Hairston agreed that he could pay the other \$600 at the time of the next purchase. (Tr. 49). Hammonds said that he would check the quality of the heroin he had bought and would get back to him in the near future if the quality was good. (Tr. 50). Hairston took the money and left.

2. The May 30, 1975, Sale.

Hammonds's second purchase of heroin from David Hairston was scheduled for the evening of May 30, 1975, in room 1036 of the Holiday Inn located on West

57th Street in Manhattan. Hammonds set up the room as a "cutting mill" with scales, spoons, sifters, bags and quantities of materials for cutting heroin such as lactose, quinine and mannite. (Tr. 52-53). He also went to the DEA fiscal office and drew \$20,000 to pay for the heroin purchase and \$85,000 as money to show or "flash" in the room. (Tr. 52). The DEA technical staff installed a listening device in room 1036 and connected it to a tape recorder in an adjoining room. (Tr. 158-59).

At 7:00 p.m. that evening, DEA Special Agent Richard Bell had David Hairston under surveillance on Jamaica Avenue at the Van Wyck Expressway in Jamaica, Queens. He observed David Hairston and the informant in a gray Mercury Cougar and Harry Hairston driving a green Dodge Colt leave a Shell service station in that area and drive toward New York City on the Grand Central Parkway. (Tr. 186-87).

At about 8:00 p.m., David Hairston and the informant arrived at room 1036. Agent Hammonds testified about what occurred inside the room, and the tape and transcript of David Hairston's conversation with Hammonds in the room were admitted into evidence at the trial. (Tr. 53-54, 58-64; GX 4A, 4B, 4C, 4D).

When David Hairston entered the room, the blocks of mannite which Agent Hammonds had placed on the bed immediately attracted his attention. He examined the blocks (Tr. 54) and asked Hammonds if he had a block already open, stating, "I want to see how sweet it is." (GX 4B, at 3). Hammonds told Hairston that he wanted to pay the \$600 owed from the last purchase and opened a brief case showing the \$105,000 he had withdrawn from the DEA fiscal office. At that point Hairston said that he would be right back and left the room. (Tr. 54; GX 4B, at 3).

By this time Agent Bell had arrived at the Holiday Inn and parked outside. Two or three car lengths in front of his car was the green Dodge Colt with Harry Hairston sitting at the wheel. (Tr. 188). Bell saw David Hairston come out of the Holiday Inn empty-handed, and enter the Dodge Colt. (Tr. 189). A couple of minutes later he got out of the Dodge Colt carrying a brown paper bag, and re-entered the Holiday Inn. (Tr. 189). When he returned to room 1036, David Hairston gave Agent Hammonds a brown paper bag which held eight individually wrapped clear plastic bags containing heroin. (Tr. 58-59).

The money in the briefcase then offered the occasion for Hairston to make a further sales pitch to Hammonds. Agent Hammonds first remarked that he was going to use the money that evening to purchase three kilograms of cocaine (Tr. 59-60; GX 4C, at 2), and Hairston responded: "Why don't you hold off on that? I should have something else." (GX 4C, at 2). He added that he had three kilograms of cocaine at that time on a ship in New York harbor worth \$135,000, and his only problem was getting it off the ship and through customs. (Tr. 60; GX 4C, at 2-4, 7). The cocaine might come off the ship that evening, Hairston said. (GX 4C, at 3). Hammonds told Hairston that a woman had gotten the boxes of mannite off a ship for him, and they discussed the possibility that she might bring out the cocaine for Hairston. (Tr. 60-61; GX 4C, at 3-4, 6-9). "If she can do it tonight," Hairston said, "I can guarantee that package tonight." (GX 4C, at 7). Hammonds agreed to try to contact the woman that evening, but he told Hairston that he doubted that he could reach her. (Tr. 61; GX 4C, at 8). Hairston said that he would call Hammonds by midnight and urged Hammonds to make the cocaine deal with him:

"David Hairston: Once I get . . . once I get in touch with my people and get things squared

away; when I talk with you it's just a matter of us getting together and movin' cause I'll have everything set up.

Garfield Hammonds, Jr.: We'll see (unintelligible)

David Hairston: If you can't get in touch with her, I'll just have it, either: like, when I get in touch, I may just have it. Okay. You understand? If I have it, then we're still squared away. If I don't have it, then we just do it all and get squared away for tomorrow." (GX 4C, at 9).

Other DEA agents were in the hotel room posing as employees of Hammonds mixing narcotics. Hairston told Hammonds that he wanted to talk privately, and they entered the bathroom and closed the door. (Tr. 61). Hairston said he did not like having other people present in the room because he was basically a one-on-one person and he liked to do business on a one-on-one basis. (Tr. 61). Hammonds said he had no objection and the next time they would make that arrangement. (Tr. 61-62).

Hairston then said to Hammonds:

"Look, I'm a wholesaler. I finance narcotics, I bring it in. I have overseas connection. I'm going to tell you what you doing wrong. Number 1, you buy in ounce quantities. What you really should do, you should buy a kilogram from me,

kilogram of heroin from me because I have kilograms of pure heroin." (Tr. 62).

Hairston said the price was \$70,000 per kilogram and continued:

"But don't get excited about that figure because this particular kilogram can be cut 23 times, and if you buy it I will personally show you how to cut it and I guarantee that you can make eight times the amount of money that you put into it." (Tr. 62).

Hammonds said that he might buy a kilogram of pure heroin if he could get a sample to test.

Hammonds gave Hairston \$17,600 for the heroin he had delivered that evening and the \$600 owed from the previous purchase. (Tr. 60-61; GX 4C, at 4-5). Hairston put the money in a paper bag together with one of the bricks of mannite which he requested "as basically a sample to show his people." (Tr. 64). At Hairston's request, Hammonds provided a New Jersey telephone number where he could be contacted. (Tr. 62-63).

Agent Bell, sitting in a car outside, saw David Hairston come through the front door of the Holiday Inn and stand under a canopy in front of the building. (Tr. 189). Harry Hairston got out of the Dodge Colt and walked to his brother. (Tr. 190). David Hairston gave a brown paper bag to Harry Hairston who carried it back to the Dodge Colt and drove away. (Tr. 190). A few minutes later, Agent Bell saw David Hairston come out of the underground garage of the Holiday Inn in the Mercury Cougar. (Tr. 190).

3. Subsequent Events.

Several weeks later Agent Hammonds met David Hairston at Bobby's Lounge, located at 125th Street and

Seventh Avenue in Manhattan, after Hairston had requested the meeting during a telephone call the preceding day. (Tr. 67-68, 75-76). During this meeting they discussed the sale of four kilograms of heroin. (Tr. 76). Eventually Hammonds agreed to buy three kilograms at a price of \$70,000 per kilogram. (Tr. 76). Hairston said he was expecting a shipment of heroin on July 3. He and Hammonds agreed to conclude the deal over dinner in Englewood, New Jersey, after receipt of the shipment. (Tr. 77).

During the time he was at Bobby's Lounge, Agent Hammonds saw David Hairston talking with Harry Hairston. (Tr. 79). Hammonds saw them leave the Lounge together and David Hairston return about fifteen or twenty minutes later. When he returned, David Hairston told Hammonds that he had fourteen ounces of heroin, but Hammonds replied that he did not want any more small buys and would wait for the July shipment. (Tr. 80). David Hairston gave Hammonds the phone number of a liquor store he owned for use if Hammonds had to contact him. (Tr. 80).

On July 2, Agent Hammonds attempted to telephone David Hairston and left a message for him to return the call. (Tr. 82, 129). Early the next morning, Hammonds received a telephone call at his home from Harry Hairston who said that his brother had asked him to call about the heroin sale. (Tr. 83-84). Hammonds said he would rather deal with David Hairston and that he would try to telephone him the next day. (Tr. 84). Hammonds got no response when he tried to telephone David Hairston on July 3. (Tr. 85). David Hairston finally telephoned Hammonds on July 10. He explained that he had had "my man" telephone Hammonds since he had been out of town. (Tr. 86; GX 5B, at 1).

B. The Defense Case

David Hairston testified, and his defense was entrapment by Safwan Salam, the Government informant.

Hairston owned a liquor store in Jamaica, New York, which had gross sales of \$15,000 to \$20,000 a month. (Tr. 222-23, 322-23). With a profit of 20 to 25 percent, Hairston's yearly earnings from his liquor business were between \$36,000 and \$60,000. (Tr. 323). While \$100 was not a lot of money to him, and he generally carried that amount around in his pocket (Tr. 297), according to Hairston a \$100 loan to Safwan Salam led to his downfall.

Hairston first met Safwan Salam in the summer or fall of 1974 through a friend and fellow liquor store owner named Robbie. (Tr. 224-25). Except for a couple of casual encounters (Tr. 225-26), Hairston did not meet Salam again until approximately a year later—during March or April of 1975—when he saw Salam walking up the street outside his liquor store. (Tr. 226). Salam came over to Hairston, told him that he had good "coke connections", and asked Hairston if he wanted to invest any money. (Tr. 226). Hairston declined, and Salam left. (Tr. 227). Salam then began to telephone the liquor store, and Hairston instructed his employees to tell Salam that he was not in. (Tr. 227).

A few days later, Salam again came to Hairston's liquor store and showed him a sample of cocaine. (Tr. 227-28). Hairston testified that he told Salam again that he was not interested in buying cocaine. (Tr. 228). Salam then sought to borrow money (Tr. 228), and Hairston loaned him \$100 because, as he testified, "I got a little leary because I was afraid that something may happen and he got busted with that cocaine around my store, and I would get in a jam." (Tr. 230).

When Hairston tried to collect the loan a few days later, Salam could not pay. (Tr. 230-33). According to Hairston, Salam thought he might borrow the \$100 from his cocaine connection, Danny, to repay Hairston, and Hairston went with Salam to visit Danny at Danny's house in Brooklyn. (Tr. 234-35, 300). While there they discussed Danny's cocaine importing operation and the opportunity for an investment and quick profit by Hairston. (Tr. 235-37). Hairston testified that he refused to invest at that time (Tr. 237); there was apparently no discussion of a loan from Danny to Salam to repay Hairston.

Hairston said that Salam discussed the cocaine investment further, stressing that he had a customer, that Hairston and Salam could both make a profit, and that Salam had no other way to get \$100 to repay Hairston. (Tr. 237-41). Hairston then reconsidered and gave \$6,000 to Danny to use to purchase cocaine in South America. (Tr. 241). Hairston testified that he had three reasons for this investment: (a) to make a profit; (b) to help Salam; and (c) to get his \$100 back. (Tr. 324-26). Hairston's cocaine investment, however, only upped his loss to \$6,100, because he never received any cocaine, and Danny kept the \$6,000. (Tr. 242, 248, 258-59).

At this point, Robbie, the other liquor store owner and friend, reappeared in Hairston's narrative. Hairston went with Robbie to a party in Brooklyn where he met a man named Saul and two Turkish men, one of whom said to Hairston: "This is Turkish heroin. It costs about \$2,500 an ounce and I have got more. If you guys know anybody who is interested, let Saul know." (Tr. 246). By this time, Hairston testified, Salam was offering him the opportunity to get back his \$6,100 by selling heroin, and he arranged the telephone

call on May 23, 1975, which was recorded by Agent Hammonds. (Tr. 242-49).

The three ounces of heroin which Hairston sold to Agent Hammonds on May 23 were part of a five ounce purchase he arranged through Saul from a Turkish man named Eddie, and the eight ounces he sold to Agent Hammonds on May 30 were part of a later ten ounce purchase by Hairston from the same source. (Tr. 250-51, 261). Hairston and Salam "cut", or diluted, the heroin in the second purchase before the delivery to Hammonds. (Tr. 261-62).

Hairston offered explanations for some of the statements he had made to Agent Hammonds. He said he had asked Hammonds in their initial May 23, 1975, telephone conversation, "What kind of consistency you gonna do, you know" (GX 3B, at 2), because he understood Hammonds was a big narcotics dealer and "I didn't want him to think I was a small guy either." (Tr. 332). When he told Hammonds in that conversation, "You know, we can establish a, a, a, word thing" (GX 3B, at 15), Hairston testified that he "just was telling him that my word was just as good as his." (Tr. 331). And Hairston testified that he was merely "puffing" (Tr. 313) when he told Hammonds in that conversation, "I have, uh, you know, other, uh, you know, stores and, uh, I got a couple factories that's interested in doing some business" (GX 3B, at 17). Hairston also said he was merely "blowing" if he made the statement to Hammonds in the bathroom at the Holiday Inn on May 30 that he had heroin that could be cut 23 times. (Tr. 318-19). Hairston testified that he talked to Hammonds about the sale of four kilograms of heroin, because "I was hoping he would eventually run out of the initial drugs he had and he would take the balance of the three ounces or a little better than three ounces that I had left" (Tr. 267).

Aside from his own testimony, Hairston presented the testimony of two former employees that he had instructed them sometime in 1975 to tell Salam when he telephoned the store that Hairston was not in, and a character witness. (Tr. 343-47, 364-67).

ARGUMENT

Hairston Was Not Entrapped As a Matter of Law.

Point I of Hairston's Brief sets forth two theories why he was entrapped as a matter of law.* One theory, discussed at pages 12-14 of his Brief, is based on the accepted doctrine that, after a defendant introduces some proof that he was induced by the Government to commit the crime charged, the Government bears the burden of establishing that he was predisposed to commit it. *Hampton v. United States*, 96 S. Ct. 1646 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*,

* At the beginning of the argument in his Brief, Hairston quotes from the concurring opinion of Mr. Justice Roberts in *Sorrells v. United States*, 287 U.S. 435, 457 (1932), that with respect to the issue of entrapment "the power and the duty to act remain with the court and not with the jury." (Br. 9). The use which Hairston attempts to make of this quotation is incorrect and confusing.

For Mr. Justice Roberts, the theoretical underpinning of the doctrine of entrapment was "the public policy which protects the purity of government and its processes." *Id.* at 455. Such issues of public policy were to be decided by the court and not the jury: "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." *Id.* at 457.

[Footnote continued on following page]

287 U.S. 435 (1932). In this part of his argument, Hairston contends that he was induced by the informant to make narcotics sales to the agent, that the burden was upon the Government to show predisposition, and that "[t]here was no evidence presented by the government to meet this burden." (Br. 13).^{*} Hairston's Brief summarizes his second theory in Point I as follows: "When the government supplied the narcotics or any illegal element to the defendant it was held as a matter of law, there was entrapment." (Br. 9). His Brief discusses this theory at pages 9-11. These claims are without merit.

The opinion of the Court by Mr. Chief Justice Hughes, however, based the defense of entrapment on a different foundation:

"We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. . . .

. . . .

To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts." *Id.* at 448, 450.

Since *Sorrells* a majority of the Supreme Court on three occasions has specifically rejected the approach taken by Mr. Justice Roberts and followed the majority opinion by Mr. Chief Justice Hughes. *Hampton v. United States*, 96 S. Ct. 1646, 1649-51 (1976); *United States v. Russell*, 411 U.S. 423, 429-30, 433-36 (1973); *Sherman v. United States*, 356 U.S. 369, 377-78 (1958).

Hairston's use of the quotation from Mr. Justice Roberts' opinion is therefore totally inappropriate.

^{*}Point II of Hairston's Brief merely repeats this argument: "There was not any evidence presented to establish the predisposition of the appellant to commit the crime." (Br. 14).

A. The Proof at Trial Fully Supported the Jury's Conclusion That Hairston Was Predisposed to Sell the Heroin.

The evidence presented by the Government from which the jury could have found Hairston predisposed to sell the heroin as charged in the Indictment included the following:

May 23, 1975, Telephone Conversation--Tape Recording and Testimony of Hammonds. The initial telephone conversation with Agent Hammonds indicated that Hairston was a large-scale drug dealer seeking to establish himself as the supplier for a new customer. Hairston showed a knowledge of the jargon of the narcotics trade, introducing into the conversation terms such as "ten stripes" and "z's". He wanted to know what would be the "consistency" of Hammond's purchases, and he said that he might be late for their meeting because he had other "stores" and "factories" interested in "doing some business".

May 23, 1975, Meeting--Testimony of Hammonds. Hairston at his first meeting with Hammonds elaborated on his qualifications to serve as Hammond's supplier. He said he was basically a wholesaler of narcotics with several overseas connections and that he could also supply hashish and cocaine. He bragged that he could provide cocaine which could be cut seven times.

May 30, 1975, Meeting--Tape Recording and Testimony of Hammonds. At the Holiday Inn meeting on May 30, Hairston displayed further aggressiveness in pushing sales. He attempted to persuade Hammonds not to make a large cocaine purchase from another supplier but to buy from him instead. He also urged Hammonds to buy from him a kilogram of pure heroin which could be

cut 23 times—at a price of \$70,000 per kilogram. As he left, he asked Hammonds for one of the bricks of mannite as a sample to show his people.

*June 24, 1975, Meeting—Testimony of Hammonds.** Hairston's sales overtures at the Holiday Inn meeting were continued at the meeting he set up with Hammonds at Bobby's Lounge on June 24. At that time Hairston agreed to sell three kilograms of heroin to Hammonds for \$210,000 out of a shipment he expected on July 3.

Use of Harry Hairston—Testimony of Powers, Bell and Hammonds, and Tape Recording. The assistance provided by Harry Hairston also indicated that David Hairston was an experienced narcotics dealer. At both the May 23 and May 30 sales to Agent Hammonds, David Hairston showed a professional's caution in leaving the narcotics with his brother in a parked car until he was satisfied about the circumstances of the purchase, as well as in transferring immediately the money and mannite to him after the Holiday Inn sale.

* Hairston in the introductory section of his Brief states that "the introduction at the trial of the conversations held subsequent to the last sale but not related to either sale" is one of the errors he claims on appeal, and he says in the statement section of his Brief that the District Court "denied a request that the jury be advised that predisposition should only be considered by testimony of acts and conversations subsequent to the second sale (T. 459)." (Br. 4, 7-8). There is no reference to these points in the argument section of Hairston's Brief.

David Hairston, however, did not even object at the trial to the admission of evidence about the conversations after May 30; the only objection was by Harry Hairston. (Tr. 68, 74-75). Furthermore, David Hairston's requests to charge did not contain any request such as described in his Brief. Indeed, David Hairston's counsel acknowledged in a statement to the District Court after the charge that the conversations after May 30 could be considered on the question of predisposition. Specifically, he stated that "there was a lot of testimony beyond May 30th which may or

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While David Hairston attempted to explain away many of his tape recorded statements as merely "puffing" and "blowing", while he denied certain details of Agent Hammonds's testimony which were not corroborated by tape recordings, and while he gave a long account of the urgings of Safwan Salam,* this merely served to create a factual issue as to the Government's evidence on predisposition to be resolved by the jury. See *United States v. Mascia*, 447 F.2d 1111 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972). It is, of course, axiomatic that a trial court, as well as an appellate court, will view the evidence in the light most favorable to the Government on a defendant's motion for a directed verdict. See *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972).

Finally, the jury was entitled to take into consideration the incredibility inherent in Hairston's testimony. It passes beyond the limits of credulity to believe that a legitimate businessman earning tens of thousands of dollars a year would resort to narcotics transactions to recover a \$100 loan. The implausibility of Hairston's story provided still further support for the jury's conclusion that, despite his denials, Hairston was an experienced narcotics dealer who was predisposed to commit

may not have any bearing at all on his state of mind on May 23rd and May 30th." (Tr. 459).

Moreover, that statement by Hairston's counsel that the post-May 30 acts and statements might well be probative of Hairston's predisposition to commit the earlier offenses was simply an acknowledgment of a well-settled principle of evidence that subsequent similar acts may reflect on a prior state of mind. See *Lutwak v. United States*, 344 U.S. 604, 618 (1963); *United States v. Miranda*, 526 F.2d 1319, 1331 (2d Cir. 1975); *United States v. Super*, 492 F.2d 319, 323 (2d Cir.), *cert. denied*, 419 U.S. 876 (1974).

* Salam did not testify. It was stipulated that the Government's agents tried to locate him but were unsuccessful. (Tr. 359).

these offenses. See *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 & n.7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States v. Arcuri*, 405 F.2d 691, 695 & n.7 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969); cf. *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).

B. The Government Did Not Engage in Conduct Which Required a Finding of Entrapment as a Matter of Law.

Hairston's Government conduct argument is based on the fiction that the Government provided the narcotics which he sold to Hammonds. The record is clear, however, that Hairston obtained the heroin from Eddie whom he met through his friend Robbie, and there has never been any suggestion that either was a Government informant.* The short answer to this argument, therefore, is that it is irrelevant to the facts of this case. Nevertheless, a response to Hairston's discussion of the caselaw is set forth below.

Hairston's Brief states that "[i]n the few cases where the government furnished the defendant contraband which constituted the crime they mostly have held that this was an entrapment as a matter of law." (Br. 10). One case which did not so hold is the latest decision on the subject of the Supreme Court of the United States, *Hampton v. United States*, 96 S. Ct. 1646 (1976), where five justices specifically rejected the argument advanced by Hairston.

In *Hampton*, Mr. Justice Rehnquist announced the judgment of the Court in an opinion joined by the Chief

* Indeed, Hairston testified that the DEA agents tried to get him to cooperate in developing evidence against Eddie and Robbie. (Tr. 274).

Justice and Mr. Justice White. The first paragraph of his opinion stated:

"This case presents the question of whether a defendant may be convicted for the sale of contraband which he procured from a government informer or agent. The Court of Appeals for the Eighth Circuit held he could be, and we agree." *Id.* at 1647.

Mr. Justice Powell, in an opinion joined by Mr. Justice Blackmun, concurred in the judgment, stating that he did not accept the proposition urged by Hampton "that the Government's supplying of contraband to one later prosecuted for trafficking in contraband constitutes a *per se* denial of due process." *Id.* at 1650. *Accord*, *United States v. Neal*, Dkt. No. 75-1413, slip op. 815 (2d Cir. June 3, 1976); *United States v. Edmonds*, Dkt. No. 75-1323, slip op. 562 (2d Cir. May 7, 1976).

The Supreme Court's decision in *Hampton* followed its decision in *United States v. Russell*, 411 U.S. 423 (1973), which reversed a judgment of the United States Court of Appeals for the Ninth Circuit that had reversed a District Court conviction solely for the reason that an undercover agent supplied an essential chemical for manufacturing the methamphetamine which had formed the basis for the conviction. The essential chemical, phenyl-2-propanone, could be purchased legally but was difficult to obtain. In discussing *Russell*, Hairston concludes that the legal character of the essential chemical supplied by the Government agent was critical to the decision and continues that "their position would have been different if the substance was illegal." (Br. 11).

Hairston's analysis of *Russell* was specifically rejected in the *Hampton* opinions by Mr. Justice Rehnquist and

Mr. Justice Powell. Mr. Justice Rehnquist stated, "Admittedly petitioner's case is different from Russell's but the difference is one of degree, not of kind." 96 S. Ct. at 1649. And Mr. Justice Powell concluded:

"Hampton would distinguish *Russell* on the ground that here contraband itself was supplied by the Government, while the phenyl-2-propanone supplied in *Russell* was not contraband. Given the characteristics of phenyl-2-propanone, this is a distinction without a difference and *Russell* disposes of this case." *Id.* at 1650 (footnote omitted).

Hairston also relies on two federal cases, *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), and *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970), as support for his argument. But the opinions by Mr. Justice Rehnquist and Mr. Justice Powell in *Hampton* make clear that those decisions did not remain viable after *Russell* for the proposition put forth by Hairston.*

* This was recognized prior to *Hampton* by several circuits. Shortly before the *Russell* decision, the Seventh Circuit in *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), in reliance on *Chisum* adopted Hairston's proffered rule. The Supreme Court vacated the judgment and remanded for consideration in light of *Russell*. *United States v. McGrath*, 412 U.S. 936 (1973). On remand, the Seventh Circuit then concluded "that *United States v. Russell* is the controlling law in this appeal and that the defense of entrapment was not available to McGrath." *United States v. McGrath*, 494 F.2d 562, 563 (7th Cir. 1974). *Bueno* was rejected by the First and Eighth Circuits following *Russell*. *United States v. Hampton*, 507 F.2d 832 (8th Cir. 1974), *aff'd*, 96 S. Ct. 1646 (1976); *United States v. Jett*, 491 F.2d 1078 (1st Cir. 1974). See generally *United States v. Ingenito*, 531 F.2d 1174, 1176 (2d Cir. 1976). Two members of the Fifth Circuit panel in *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974), continued to maintain before the Supreme Court decision in *Hampton* that *Bueno* re-

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Mr. Justice Rehnquist stated that the Court in *Russell* had "ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established." 96 S. Ct. at 1649. Mr. Justice Powell agreed with this analysis:

"I agree with the plurality that *Russell* definitively construed the defense of 'entrapment' to be focused on the question of predisposition. 'Entrapment' should now be employed as a term of art limited to that concept." *Id.* at 1651 n.2.*

Hairston's argument that he was entrapped as a matter of law because of the Government's conduct here is thus both factually wrong and legally unsound.

mained viable after *Russell*. Judge Gee in a concurring opinion, however, stated, "I cannot agree that *Bueno* remains good law." 490 F.2d at 166. He continued:

"It seems plain to me that in its *Russell* opinion the Court is saying that there have been two views about entrapment since its inception, a majority view which focused solely on the predisposition of the defendant and a minority view which focused either solely or in addition on the activity of the governmental agents, and that the Court deliberately rejects the second view and hews to the first." *Id.* at 167 (footnote omitted).

* Mr. Justice Rehnquist's opinion indicated that acts of Government agents could never prevent the conviction of a predisposed defendant; if illegal police activity occurs the remedy is to prosecute the police under state or federal law. 96 S. Ct. at 1649-50. Mr. Justice Powell did not join this part of Mr. Justice Rehnquist's opinion and indicated that there might be circumstances where he would conclude that due process principles or the Court's supervisory power could support a bar to conviction based on Government misconduct. He stressed, however, that the type of police activity about which Hairston purports to complain would not be sufficient:

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CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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"I emphasize that the cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover government involvement." *Id.* at 1652 n.7.

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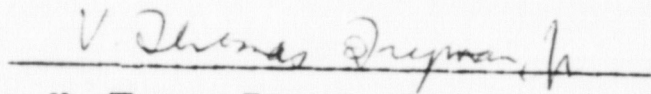
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

V. Thomas Fryman, Jr., being duly sworn,
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New
York.

That on the 14th day of July 1976
he served ~~2 copies~~ ^{2 copies} of the within Brief of the United States
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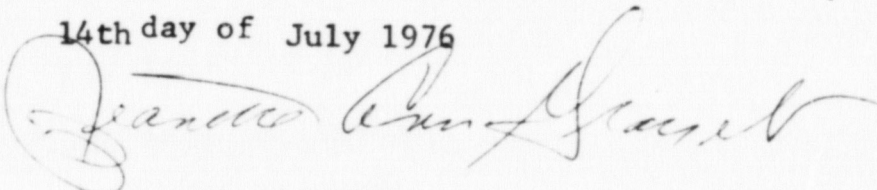
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New York.


V. Thomas Fryman, Jr.

Sworn to before me this

14th day of July 1976



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